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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

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05/23/2019 WITHOUT ORAL
ARGUMENT

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1 Defendants Lockheed Martin Services, Inc. (“LMSI”) and Lockheed
2 Martin Corporation (“LMC”) respectfully request that the Court take judicial
3 notice pursuant to Fed. R. Evid. 201 of LMC’s Management Incentive
4 Compensation Program Plans (“MICP Plans”) and their contents in connection
5 with Defendants’ motions to dismiss. The Court may also consider these
6 documents under the doctrine of incorporation by reference. LMC and LMSI
7 request that the Court take judicial notice of or incorporate by reference the
8 following adjudicative facts: (1) from 2009 – 2016, LMC had a publicly
9 disclosed MICP plan; (2) a stated purpose of each MICP Plan was to establish
10 performance goals within the meaning of Section 162(m) of the Internal Revenue
11 Code; (3) each Plan states that only LMC employees were eligible to participate;
12 and (4) each Plan provides that MICP payments are determined using a formula
13 that accounts for individual and organizational performance.

14 **I. INTRODUCTION**

15 The MICP Plans are relevant because the government has asserted a claim
16 under the Anti-Kickback Act, 41 U.S.C. § 8701, *et seq.*, against all Defendants
17 that is premised on incentive compensation LMC provided through its
18 Management Incentive Compensation Program (“MICP”). *See* Complaint, ECF
19 No. 1, at ¶¶ 118-123 (alleging that LMC used its MICP to provide incentive
20 compensation in exchange for favorable treatment of LMC and LMSI). Although
21 the Complaint discusses LMC’s MICP and payments to certain seconded LMC
22 employees and quotes from employees’ MICP self-evaluations, the government
23 does not attach the MICP Plans governing the program. All of LMC’s MICP
24 Plans for the relevant period are public documents that LMC filed with the
25 Securities and Exchange Commission (“SEC”). Accordingly, the Court may
26 either take judicial notice of each of the MICP Plans or consider them through

1 the doctrine of incorporation by reference.

2 **II. PROPOSED DOCUMENTS**

3 Defendants propose the MICP Plans listed below for judicial notice and
4 incorporation by reference. These Plans were in effect during the relevant period
5 (2009-2016) and are publicly accessible through the SEC's Electronic Data
6 Gathering, Analysis, and Retrieval ("EDGAR")¹ system. True and correct copies
7 the MICP Plans are attached to the accompanying Declaration of Patrick M.
8 Hagan and are listed below:

9 **Exhibit A** – MICP Plan As Amended January 22, 2009 (the "2009 MICP
10 Plan A"), filed publicly with the SEC as Exhibit 10.15 to LMC's February 26,
11 2009 Form 10-K, and available at:
12 [https://www.sec.gov/Archives/edgar/data/936468/000119312509038670/dex10](https://www.sec.gov/Archives/edgar/data/936468/000119312509038670/dex1015.htm)
13 [15.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312509038670/dex1015.htm).

14 **Exhibit B** – MICP Plan As Amended June 25, 2009 (the "2009 MICP Plan
15 B"), filed publicly with the SEC as Exhibit 10 to LMC's July 22, 2009 Form 10-
16 Q, and available at:
17 [https://www.sec.gov/Archives/edgar/data/936468/000119312509153203/dex10.](https://www.sec.gov/Archives/edgar/data/936468/000119312509153203/dex10.htm)
18 [htm](https://www.sec.gov/Archives/edgar/data/936468/000119312509153203/dex10.htm).

19 **Exhibit C** – MICP Plan As Amended January 28, 2010 (the "2010 MICP
20 Plan"), filed publicly with the SEC as Exhibit 99.1 to LMC's January 29, 2010
21 Form 8-K, and available at:
22 [https://www.sec.gov/Archives/edgar/data/936468/000119312510017229/dex99](https://www.sec.gov/Archives/edgar/data/936468/000119312510017229/dex991.htm)
23 [1.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312510017229/dex991.htm).

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25 ¹ *United States Securities and Exchange Commission, EDGAR Company Filings,*
26 <https://www.sec.gov/edgar/searchedgar/companysearch.html>.

1 **Exhibit D** – MICP Plan As Amended January 27, 2011 (the “2011 MICP
2 Plan”), filed publicly with the SEC as Exhibit 99.1 to LMC’s February 3, 2011
3 Form 8-K, and available at:

4 [https://www.sec.gov/Archives/edgar/data/936468/000119312511022096/dex99](https://www.sec.gov/Archives/edgar/data/936468/000119312511022096/dex991.htm)
5 [1.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312511022096/dex991.htm).

6 **Exhibit E** – MICP Plan As Amended January 24, 2013 (the “2013 MICP
7 Plan”), filed publicly with the SEC as Exhibit 10.2 to LMC’s January 28, 2013
8 Form 8-K, and available at:

9 [https://www.sec.gov/Archives/edgar/data/936468/000119312513026251/d4739](https://www.sec.gov/Archives/edgar/data/936468/000119312513026251/d473930dex102.htm)
10 [30dex102.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312513026251/d473930dex102.htm).

11 **Exhibit F** – MICP Plan As Amended January 23, 2014 (the “2014 MICP
12 Plan”), filed publicly with the SEC as Exhibit 10.1 to LMC’s January 28, 2014
13 Form 8-K, and available at:

14 [https://www.sec.gov/Archives/edgar/data/936468/000119312514024241/d6586](https://www.sec.gov/Archives/edgar/data/936468/000119312514024241/d658624dex101.htm)
15 [24dex101.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312514024241/d658624dex101.htm).

16 **Exhibit G** – MICP Plan As Amended January 1, 2015 (the “2015 MICP
17 Plan”), filed publicly as Exhibit 10.1 to LMC’s April 22, 2015 Form 10-Q, and
18 available at:

19 [https://www.sec.gov/Archives/edgar/data/936468/000119312515141818/d8877](https://www.sec.gov/Archives/edgar/data/936468/000119312515141818/d887742dex101.htm)
20 [42dex101.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312515141818/d887742dex101.htm).

21 **Exhibit H** – MICP Plan As Amended January 1, 2016 (the “2016 MICP
22 Plan”), filed publicly with the SEC as Exhibit 10.1 to LMC’s February 2, 2016
23 Form 8-K, and available at:

24 [https://www.sec.gov/Archives/edgar/data/936468/000119312516447743/d1297](https://www.sec.gov/Archives/edgar/data/936468/000119312516447743/d129701dex101.htm)
25 [01dex101.htm](https://www.sec.gov/Archives/edgar/data/936468/000119312516447743/d129701dex101.htm).

26 Defendants also request that the Court take notice of the existence of

1 certain statements in each of the MICP Plans, which generally provide that:

2 (1) One purpose of the Plan is to “[e]stablish performance goals within the
3 meaning of Section 162(m) of the Internal Revenue Code.”²

4 (2) Participation in the Plan is limited to LMC employees.³

5 (3) MICP payments to individual employees are determined using a
6 formula that accounts for individual and organizational performance.⁴

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8 ² See 2009 MICP Plan A at Article I, p. 1 (“The Plan is intended to achieve the
9 following: ... (4) Establish performance goals within the meaning of Section
10 162(m) of the Internal Revenue Code.”); 2009 MICP Plan B at Article I, p. 1
11 (same); 2010 MICP Plan at Article I, p. 1 (same); 2011 MICP Plan at Article I,
12 p. 1 (same); 2013 MICP Plan at Article I, p. 1 (same); 2014 MICP Plan at Article
13 I, p. 1 (same); 2015 MICP Plan at Article I, p. 1 (same); 2016 MICP Plan at
14 Article I, p. 1 (same).

15 ³ See 2009 MICP Plan A at Article IV, p. 3 (“Employees who through their efforts
16 are able to contribute significantly to the success of the Company in any given
17 Plan Year will be considered eligible for selection for participation in the Plan.”);
18 2009 MICP Plan B at Article IV, p. 3 (same); 2010 MICP Plan at Article IV, p.
19 3 (same); 2011 MICP Plan at Article IV, p. 3 (same); 2013 MICP Plan at Article
20 IV, p. 3 (“Those eligible shall include only those Employees considered by the
21 Committee to be key Employees of the Company.”); 2014 MICP Plan at Article
22 IV, p. 3 (same); 2015 MICP Plan at Article IV, p. 3 (same); 2016 MICP Plan at
23 Article III, p. 2 (“Employees who are considered by the Chief Executive Officer
24 to be key Employees of the Company also are eligible to participate in the
25 Plan[.]”).

26 ⁴ See 2009 MICP Plan A at Plan Exhibit A, p. i-iii (providing that MICP payments

1 **III. LAW AND ARGUMENT**

2 There are two well-established exceptions to the general rule that courts
3 may not consider materials outside the complaint when ruling on a motion to
4 dismiss: (1) judicial notice under Fed. R. Evid. 201, and (2) the incorporation-
5 by-reference doctrine. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998
6 (9th Cir. 2018). Both permit the Court to consider LMC’s MICP Plans.

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8 “will be calculated by multiplying the Participant’s Annual Salary by the
9 applicable Target Level of the Participant..., and that result will then be
10 multiplied by the Individual Performance Factor, [which] will be multiplied by
11 the appropriate Organizational Performance Factor”); 2009 MICP Plan B at Plan
12 Exhibit A, p. i-iii (same); 2010 MICP Plan at Plan Exhibit A, p. i-iii (same); 2011
13 MICP Plan at Plan Exhibit A, p. i-iii (same); 2013 MICP Plan at Plan Exhibit A,
14 p. i-iii (providing that MICP payments “will be calculated by multiplying the
15 Participant’s Annual Salary by the applicable Target Level of the Participant...,
16 and that result will then be multiplied by the Applicable Performance Factor,
17 which is composed of the Individual Performance Factor . . . , the Enterprise
18 Performance Factor . . . , and the Business Area Performance Factor”); 2014
19 MICP Plan at Plan Exhibit A, p. i-iii (same); 2015 MICP Plan at Plan Exhibit A,
20 p. i-iii (same); 2016 MICP Plan at Article V, p. 3 (“Subject to Section 2.02,
21 Article IV and any performance goals (including organizational or enterprise
22 performance goals) established by the Committee or its delegate for the Plan Year
23 (such goals to be established on or before March 30 of the Plan Year), the
24 Committee (or the Committee’s delegate in the case of Participants who are not
25 Elected Officers) shall determine the proposed amount of Incentive
26 Compensation to be paid to each Participant with respect to a Plan Year.”).

1 **A. Taking Judicial Notice of the Plan is Proper.**

2 Judicial notice of adjudicative facts, or “the facts of the particular case,”⁵
3 is proper when the facts are not subject to reasonable dispute. Fed. R. Evid.
4 201(b)(1)-(2). An adjudicative fact is “not subject to reasonable dispute” when
5 it: (1) is generally known or (2) can be accurately and readily determined from
6 sources whose accuracy cannot be reasonably questioned. *See Khoja*, 899 F.3d
7 at 999; *Renfro v. Quality Loan Serv. Corp.*, No. 2:17-CV-0194, 2017 U.S. Dist.
8 LEXIS 159068, at *6 (E.D. Wash. Sept. 27, 2017). A court “must take judicial
9 notice if a party requests it and the court is supplied with the necessary
10 information.” Fed. R. Evid. 201(c).

11 “Courts routinely take judicial notice of such things as public SEC filings.”
12 *City of Roseville Emples. Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092,
13 1107 (E.D. Wash. 2013) (collecting cases); *see also Metzler Inv. GMBH v.*
14 *Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064, n.7 (9th Cir. 2008) (SEC filings
15 subject to judicial notice); *Dreiling v. Am. Exp. Co.*, 458 F.3d 942, 946 n.2 (9th
16 Cir. 2006) (same); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir.
17 1999) (same). That is because courts presume that documents required to be filed
18 by law are generally “authentic and trustworthy.” *Melville v. Bank of N.Y. Mellon*
19 *Corp.*, No. 2:17-CV-30, 2017 U.S. Dist. LEXIS 154950, at *6 (E.D. Wash. Sept.
20 21, 2017) (citing *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir.
21 1999)); *see also In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*,
22 763 F. Supp. 2d 423, 583 (S.D.N.Y. 2011) (taking judicial notice of “legally
23 required public disclosure documents filed with the SEC” (internal citation and
24 quotations omitted)).

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26 ⁵ *See* Fed. R. Evid. 201 advisory committee's note.

1 Here, judicial notice is appropriate because LMC filed each of the MICP
2 Plans as exhibits to its SEC filings, and those documents are publicly available
3 through the SEC's EDGAR system. LMC discloses its applicable MICP Plan as
4 part of its efforts to comply with SEC regulations requiring disclosure of certain
5 information about compensation for executives, including the amount of
6 compensation, the criteria used to determine compensation, and the relationship
7 between the company's executive compensation practices and corporate
8 performance. *See, e.g.*, 17 C.F.R. § 229.402.

9 **B. The Complaint Incorporates the Documents by Reference.**

10 The government's focus on LMC's MICP also permits the Court to
11 consider the MICP Plans under the incorporation by reference doctrine. "The
12 doctrine of incorporation by reference allows 'a district court to consider
13 documents whose contents are alleged in a complaint and whose authenticity no
14 party questions, but which are not physically attached to the plaintiff's
15 pleading.'" *City of Roseville*, 963 F. Supp. 2d at 1106-07 (quoting *In re Silicon*
16 *Graphics, Inc. Sec. Litig. (SGI)*, 183 F.3d 970, 986 (9th Cir. 1999)). "Once a
17 document is deemed incorporated by reference, the entire document is assumed
18 to be true for purposes of a motion to dismiss, and both parties – and the Court –
19 are free to refer to any of its contents." *Id.* at 1107; *see also United States v.*
20 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (acknowledging that a district court
21 may assume that the contents of a document incorporated by reference "are true
22 for purposes of a motion to dismiss").

23 **IV. CONCLUSION**

24 The following facts are appropriate for judicial notice under Fed. R. Evid.
25 201(c)(2) because Defendants have supplied the Court with the necessary
26 information, and the Court may also consider them through the doctrine of

1 incorporation by reference:

- 2 1. From 2009 – 2016, LMC had a publicly disclosed MICP plan.
- 3 2. A stated purpose of each MICP Plan was to establish performance goals
- 4 within the meaning of Section 162(m) of the Internal Revenue Code.
- 5 3. Each Plan states that only LMC employees were eligible to participate.
- 6 4. Each Plan provides that MICP payments are determined using a formula
- 7 that accounts for individual and organizational performance.

8 DATED this 23rd day of April, 2019.

9 Respectfully submitted,

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